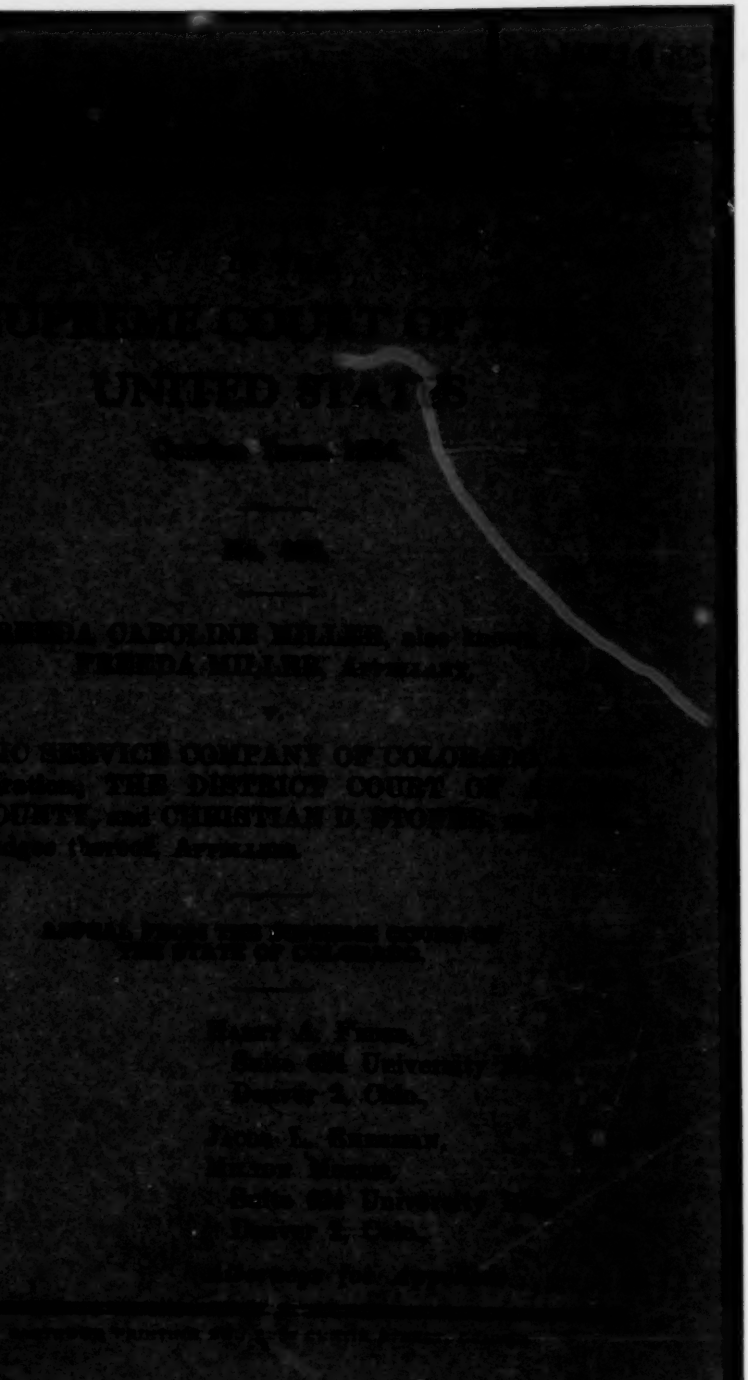

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954.

No. 460.

FREEDA CAROLINE MILLER, also known as FREEDA MILLER, APPELLANT,

v.

PUBLIC SERVICE COMPANY OF COLORADO, a corporation; THE DISTRICT COURT OF ADAMS COUNTY, and CHRISTIAN D. STONER, one of the Judges thereof, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF OPPOSING MOTION TO DISMISS

COMES NOW the Appellant, and files her brief opposing the Appellee's Motion to Dismiss:

I.

THE JUDGMENT OF THE COLORADO SUPREME COURT DISCHARGING ITS RULE TO SHOW CAUSE WAS A FINAL DECISION.

The argument of the Appellee on this point is based upon the fact that the procedure in the Colorado Su-

preme Court was termed an "Action In The Nature Of Prohibition" rather than an "Action For A Writ Of Prohibition."

The contention of Appellee in this regard must be considered as frivolous. It is the nature of the procedure in the State Court which determines the appealability of a judgment, and not its form or designation.

Appellee does not challenge the cases cited on page 3 of our jurisdictional statement which hold that denial of a writ of prohibition by a state court of last resort constitutes a final judgment within the meaning of Title 28, U.S. Code, Sec. 1257 (2).

In the case of *Mt. Vernon-Woodberry Cotton Duck Co. vs. Alabama Interstate Power Co.*, 240 U.S. 30, 36 Sup. Ct. 234, 60 L.Ed. 507, at page 510, this Honorable Court, speaking through Mr. Justice Holmes, stated:

> "There is a motion to dismiss the writ of error on the ground that the present decision is not final because it does not determine the merits; but this motion must be denied. Prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of the judicial code, act of March 3, 1911, Chap. 231, Sec. 237, 36 Stat. at L. 1087, 1156, Comp. Stat. 1913, Sections 968, 1214, under the Statutes of Alabama and by the common law. Code of 1907, Sections 4864-4867, 4872; Weston vs. Charlston, 2 Pet. 449, 464, 465, 7 L. ed. 481, 486, 487. The fact that it does not decide the merits of the principal suit is immaterial. It is not devoted to that point, but only to the preliminary question of the jurisdiction of the Court in which that suit is brought."

To the same effect, see *Rescue Army vs. Municipal Court of the City of Los Angeles*, 331 U.S. 549, 585, 67 Sup. Ct. 1409, 91 L.ed. 1666; *Dandini Petroleum Co. vs.*

Superior Court, 284 U.S. 8, 76 L.ed. 136, 52 Sup. Ct. 103; *Michigan Central Co. vs. Mix*, 278 U.S. 492, 49 Sup. Ct. 207, 73 L.ed. 470; *Madruga vs. Superior Court*, 346 U.S. 556, 74 Sup. Ct. 298; *Hammerstein vs. Superior Court*, 341 U.S. 491, 71 Sup. Ct. 820, 95 L.ed. 1135.

The reasoning of this Court in the above cases is equally applicable to the instant case. The action instituted by the Appellant in the Colorado Supreme Court was a separate, independent action to restrain the District Court from further proceedings.

The Colorado Supreme Court entertained Appellant's petition, issued its rule to show cause, and considered the constitutional issues raised by Appellant.

It is true that Rule 116 of the Colorado Rules of Civil Procedure provides: "Relief in the nature of prohibition will not be granted except in matters of great public importance."

The Colorado Supreme Court must necessarily have considered this case to fall within that category since it entertained Appellant's petition.

The proper application of Rule 116 is a matter of state law. Appellee could properly argue in the Colorado Supreme Court that this matter was not of public importance, and that, therefore, the petition of the Appellant should be dismissed. But Appellee is foreclosed from making such argument in this Court. The action of the Colorado Supreme Court in entertaining Appellant's petition and considering the issues raised therein constitutes a determination that this case is of great public importance within the meaning of Rule 116. This determination by the Colorado Supreme Court is binding upon this Court, since it involves only issues of state procedure.

The cases of *Swift vs. Smith*, 119 Colo. 126, 201 P. (2d) 609 and *Potashnik vs. Public Service Company*, 126 Colo. 98, 247 P. (2d) 137 which are cited on page 5 of

Appellee's Motion to Dismiss, were actions in the nature of certiorari. The property owners in those cases sought review in the Colorado Supreme Court *after* the trial court had entered an order granting temporary possession.

The decisions of the Colorado Court in those cases have no application to this case, since Appellant sought an order from the Colorado Supreme Court to prohibit the trial court from proceeding in the matter. Unlike the *Potashnik* and *Swift* cases, Appellant did not ask the Colorado Supreme Court to review or set aside any decision of the trial court.

Nor are the cases of *First National Bank of Greeley vs. Minnesota Mines, Inc.*, 109 Colo. 6, 121 P.(2d) 488 (1942); *Burlington & C. R. Co. vs. Colorado Eastern R. Co.*, 45 Colo. 222, 100 Pac. 607 (1909), in point, since they did not involve actions in the nature of prohibition.

We are not here concerned with the issue of the finality of a decision of the trial court denying a motion to dismiss. That was the issue in the cases of the *First National Bank of Greeley vs. Minnesota Mines*, supra, and *Burlington and C. R. Co. vs. Colorado Eastern R. Co.*, supra. What we are here concerned with is the finality of a decision of a state court of last resort denying a writ of prohibition.

The statement of Appellee on page 6 of its Motion to Dismiss that "the Colorado Supreme Court has merely affirmed an order overruling a motion to dismiss" is not correct. The only action taken by the Colorado Supreme Court was the discharge of its rule to show cause. At no point in the opinion or judgment of the Colorado Supreme Court does it undertake to determine the correctness of the action of the trial court in denying Appellant's Motion to Dismiss.

II.

THIS APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION.

In Appellee's Motion to Dismiss, it is contended that a substantial federal question is not presented as there is a valid distinction between corporate and other public utilities. The Appellee does not point out that Colorado statutes have already set up the classification of public utilities as including both individual and corporate enterprises.

The cases cited by Appellee on this point do not hold that the constitutional issue raised by this appeal does not present a substantial federal question. The cases cited by Appellee hold only that under the particular circumstances presented in those cases that there was no denial of the equal protection of the law. But, in the instant case the statute under attack does result in a denial of the equal protection of the law, since its provisions confer upon corporations the right to condemn property, but deny individuals that right. We are not concerned with a law providing for the licensing or franchising of public utilities. It was that type of statute which was considered by the Court in *Los Angeles vs. Southern California Telephone Company*, 32 Cal. 2d. 378, 196 P. (2d) 773, cited by Appellee.

If Colorado had permitted corporations to operate as public utilities, but denied such privilege to individuals, we would have the same issue which was presented in the *Southern California Telephone* case.

But Colorado has granted to individuals and corporations alike, the right to carry on business as a public utility, Sec. 3, Chap. 137, 1935 C.S.A., which provides as follows:

> "The term 'public utility,' when used in this chapter, includes every common carrier, pipe-line corporation,

> gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, person or municipality operating for the purpose of supplying the public for domestic, mechanical or public uses, and every corporation, or person now or hereafter declared by law to be affected with a public interest, and each thereof, is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the Commission and to the provisions of this chapter; * * *."

Accordingly, it can not be contended that there is any reasonable basis for distinguishing between corporations and individuals in the public utility field.

The action of the Colorado legislature in grouping together corporations and individuals, and recognizing that both corporations and individuals are qualified to engage in public utilities constitutes a legislative recognition that there is no legitimate basis for distinguishing between the two classes in this field. This reasoning is further borne out by the pronouncement of the Colorado Supreme Court in *Potashnik vs. Public Service Co. of Colorado,* supra, wherein it said:

> "Statutes granting to certain types of corporations, of which the Company is one, the right to exercise the powers of eminent domain, and the charter provisions of such corporations to enable them to take advantage of this privilege, grant no power in addition to that accorded by the specific provisions of the general law covering that subject, *and are designed only to give to those particular corporations the same rights under the eminent-domain provisions as might be exercised by an individual under the same circumstances.*" (Emphasis supplied.)

Appellee contends that Appellant does not have standing to raise the issue of denial of equal protection of the law, since the Appellant is not in the class which is dis-

criminated against. In making this contention Appellee overlooks a well-recognized exception to the general rule, as stated in 16 C.J.S. Constitutional Law, sec. 88, page 181:

> "EXCEPTIONS TO RULE. Any person affected by the application of a statute alleged to be discriminatory can, *even though not belonging to the class discriminated against,* urge its unconstitutionality when no member of the injured class is in a position to raise the question; or, although there appears to be authority to the contrary, where there is no probability of the Statute being challenged by a member of such class, or, if so challenged, it would be unnecessary for the court to decide such question. It has also been held that where the provision attacked is, as a whole, unconstitutional, a person affected by the statute may raise the question, even though he is not of the class discriminated against." (Italics supplied.)

In the notes to said section above quoted on page 181 under the heading "Reason for rule," appears the following language:

> "Where no member of a class discriminated against could ever attack the constitutionality of the discriminatory statute, the rule reserving to such persons the right to raise the constitutional question would totally prevent the exercise by the court of its function of passing upon that question, and would place it in a position where it would for all time enforce rights and obligations created by an obviously void enactment. In such case any litigant to the determination of whose claim the constitutional question is fairly relevant should be permitted to raise the constitutional question." *Quong Ham Wah Co. vs. Industrial Acc. Commission of California,* 192 P. 1021, 1024, 184 Cal. 26, 12 A.L.R. 1190, error dismissed 41 S. Ct. 373, 255 U.S. 445, 65 L.Ed. 723.

We respectfully submit to this Honorable Court that the Appellant falls within the recognized exception to the general rule.

From the factual situation involved, these points are evident: first, under the general rule, the only objectors to the constitutionality of the law could be persons engaged in business as a public utility. Second, no such objector could bring an action testing the constitutionality of the statute involved, since an individual operating a public utility seeking to condemn could not attain that end by attacking the statute. His only remedy would be legislative in nature, that is, the procurement of the passage of a proper bill by the State legislature. Third, this Appellant is having her land condemned. Therefore, she has a right that is different from any other citizen as she is the only person affected.

Finally, Appellee argues that "the manufacture and sale of electric energy is public" (page 12). But this is not the issue. Appellant attacks the validity of the Colorado Statute because it grants the power of eminent domain to public utility corporations without restriction to public uses. The fact that the statute authorizes the taking of private property for a private use is a fatal defect. A statute which is unconstitutional on its face can not be saved by judicial construction. Appellee quotes, on page 7 of its motion from the Colorado Statute in question. However, it deletes from its quotation, the very provisions, the validity of which is being challenged. The entire text of the statute is as follows (italicized portions are those which were omitted from quotation in Appellee's motion):

> "Section 52. COMPANIES THAT MAY CONDEMN REAL ESTATE, RIGHTS OF WAY, EASEMENTS OR OTHER RIGHTS. If any corporation formed for the purpose of constructing a road, ditch, reservoir, pipe line, bridge, ferry, tunnel, telegraph line, railroad line, electric line or electric plants,

shall be unable to agree with the owner, for the purchase of any real estate *or right of way or easement or other right necessary or required for the purpose of any such corporation, for transacting its business, or for any lawful purpose connected with the operations of the company*, such corporation may acquire title to such real estate *or right of way, or easement or other right*, in the manner provided by law for the condemnation of real estate, *or right of way; and any ditch, reservoir, or pipe line company may, in the same manner, condemn and acquire the right to take and use any water not previously appropriated.*"

Obviously, even though a corporation may be engaged in the business of a public utility, many of its activities do not involve public functions. For example, a public utility may own and operate an office building. It is only for actual public uses that private property may constitutionally be condemned. Since the Colorado Statute authorizes condemnation of private property, regardless of whether the intended use be public or private, it violates the provision of the Fourteenth Amendment to the Constitution.

CONCLUSION

We have not attempted here to present an exhaustive discussion of the issues presented by this appeal. We believe it is clear that the issues raised present substantial questions arising under the Constitution of the United States. Accordingly, the motion to dismiss should be denied.

Respectfully submitted,

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